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No. 97-50

In The

Supreme Court of The United States

October Term 1996

DAN E. HALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

with Appendix

*ROBERT W. RITCHIE
WADE V. DAVIES
RITCHIE, FELS & DILLARD, P.C.
606 W. Main Street, Suite 300
P.O. Box 1126
Knoxville, TN 37901-1126
(423) 637-4623

Attorneys for Petitioner
**Counsel of Record*

LEGAL ADVANTAGE * 432 Walnut Street * Cincinnati, OH 45202
(800) 581-2252

60 pp

QUESTIONS PRESENTED

WHETHER THE SIXTH CIRCUIT'S RESTRICTIVE INTERPRETATION OF *BRADY v. MARYLAND*, WHICH PROHIBITS DISTRICT COURTS FROM CONTROLLING THE TIMING AND MANNER OF PRODUCTION OF *BRADY* MATERIAL, VIOLATED DR. HALE'S RIGHT TO DUE PROCESS BY PREVENTING DEFENSE COUNSEL FROM RECEIVING AND MAKING EFFECTIVE USE OF *BRADY* MATERIAL.

WHETHER THE STRICTER STANDARD OF *BRADY* REVIEW, WHICH MANDATES REVERSAL ONLY WHEN THERE IS A REASONABLE LIKELIHOOD THAT FALSE TESTIMONY COULD HAVE AFFECTED THE JUDGMENT OF THE JURY, SURVIVES *KYLES v. WHITLEY* AND APPLIES TO A SITUATION IN WHICH THE PROSECUTOR ELICITED A FALSE STATEMENT FROM A KEY PROSECUTION WITNESS ON REDIRECT EXAMINATION.

WHETHER THE SIXTH CIRCUIT'S INTERPRETATION OF RICO'S "RELATEDNESS" REQUIREMENT, WHICH ALLOWS UNRELATED MAIL FRAUD SCHEMES TO BE JOINED IN ONE RICO COUNT AS LONG AS EACH SCHEME ALLEGES MULTIPLE MAILINGS, EVISCERATES THE "RELATEDNESS" REQUIREMENT AND RENDERS THE STATUTE UNCONSTITUTIONALLY VAGUE.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dan E. Hale respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered January 28, 1997.

OPINIONS BELOW

The District Court Judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on January 28, 1997. *United States of America v. Dan E. Hale*, No. 95-5915 (6th Cir. 1/28/97).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 28, 1997. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on February 11, 1997. Rehearing was denied on April 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V.

18 United States Code Section 1961(5).

18 United States Code Section 1962(c).

18 United States Code Section 3500(b).

STATEMENT OF THE CASE

Dr. Dan Hale operated a large medical center serving primarily indigent patients in rural East Tennessee.

At trial, it was undisputed that a group of Dr. Hale's patients from Mt. Vernon, Kentucky, organized an insurance fraud scheme. Led by Russell Ramsey, this group managed to purchase multiple, supplemental insurance policies, which paid claimants an amount for each day they were in a hospital. Thereafter, these individuals sought hospitalization for injuries that they had faked. The multiple insurance policies provided a windfall for each hospitalized patient. Each participant in the scheme provided a percentage of his or her take to the organizer, Russell Ramsey.

The government indicted and convicted some 32 people involved in the insurance scam. As the participants began to try to cooperate with the government, the investigators turned their attention to their doctor. On September 29, 1994, Dr. Hale was indicted. The original indictment alleged that Dr. Hale participated in a RICO conspiracy and committed a substantive RICO violation by participating in the affairs of Boulevard West Medical Center (BWMC) through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). The government superseded the indictment because it had improperly alleged

jurisdiction over certain counts.[1] The superseding indictment alleged mail fraud as the "racketeering activity." The allegations of mail fraud fell into two distinct, unrelated groups. The first group of counts alleged that Dr. Hale aided and abetted the over- insurance scheme perpetrated by his patients from Kentucky. In the second distinct group of mail fraud counts, Dr. Hale was alleged to have committed mail fraud against Medicare/Medicaid by billing and receiving reimbursement for unnecessary medical procedures.

With regard to the insurance fraud scheme, the question at trial was whether Dr. Hale knew that his Mt. Vernon, Kentucky, patients had devised a scheme to defraud the insurance companies and whether he knowingly aided and abetted their efforts by admitting them to the hospital without medical reason.

As one of their final witnesses, the government called Russell Ramsey, the organizer, to testify against Dr. Hale. Ramsey portrayed himself as having a close relationship with the doctor. He testified that after he became involved in the insurance scheme, he got other people involved. He testified that he would introduce a new patient to Dr. Hale by telling him that he had somebody that had been hurt and that he wanted Dr. Hale to doctor them. The prosecutor then asked

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[1]The district court had jurisdiction pursuant to 18 U.S.C. § 3231 to hear allegations of a violation of a fedeal criminal statute.

Ramsey whether Dr. Hale seemed like he knew what Ramsey meant, and Ramsey said that he did.

Among other extremely damaging claims, Ramsey testified that Dr. Hale told him how to have his family and friends act in the hospital. Finally, Ramsey testified that Dr. Hale knew what was going on. Ramsey even claimed that he once complained to Dr. Hale about a problem with all the insurance forms.

What defense counsel did not know, however, was that Mr. Ramsey had given a series of three interviews to the prosecution team, including the prosecutor himself. In the first two interviews, Ramsey admitted that he had organized the insurance fraud scheme, but he exonerated Dr. Hale from any involvement. In fact, the second memorandum of interview reflects that although the Assistant United States Attorney who handled the case confronted Ramsey with the government's belief that there must have been an agreement with the doctors, Russell confirmed that he went in and lied to the doctor about the injuries of the people he brought in there. He insisted there was no "predetermined agreement between he [sic] and the doctors." Ramsey also responded to interrogation about why he would protect the doctors by saying that he would not do so. As the United States Court of Appeals for the Sixth Circuit found in its opinion, these exculpatory statements and others it listed in what it called a "nonexhaustive list of *Brady* material" showed that, "the

government's contention that the interview summaries do not contain exculpatory material is patently unsupportable."

Despite the obvious exculpatory nature of the memoranda, the prosecution declined to produce them.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S RESTRICTIVE INTERPRETATION OF *BRADY v. MARYLAND*, WHICH PROHIBITS DISTRICT COURTS FROM CONTROLLING THE TIMING AND MANNER OF PRODUCTION OF *BRADY* MATERIAL, VIOLATED DR. HALE'S RIGHT TO DUE PROCESS BY PREVENTING DEFENSE COUNSEL FROM RECEIVING AND MAKING EFFECTIVE USE OF *BRADY* MATERIAL.

Because the United States Court of Appeals for the Sixth Circuit has unduly restricted the authority of district courts to order pretrial production of *Brady* material, even in extremely complex cases such as this one, Dr. Hale had no way to compel the government to produce this extraordinarily important *Brady* material. *See United States v. Presser,* 844 F.2d 1275 (6th Cir. 1988). Had the district court had the authority to compel pretrial production of *Brady* material in this complex case, this problem would never have arisen. Dr. Hale respectfully suggests that this Honorable Court should grant his Petition for Writ of Certiorari and reject the overly restrictive interpretation by the Sixth Circuit, which conflicts

with the holdings of several other circuits and is contrary to the spirit of *Brady v. Maryland*[2] and *Kyles v. Whitley*.

In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), this Court clarified the standard of appellate review for *Brady* violations and emphasized the prosecutor's responsibility for ensuring that *Brady* material is obtained and disclosed. *Kyles v. Whitley*, 115 S. Ct. at 1567-69. This Court did not address, however, the timing and procedure for *Brady* disclosure or the district court's authority to regulate the timing of such disclosure. Dr. Hale respectfully submits that clarification of this important and decisive issue is worthy of this Court's consideration.

Unlike other circuits, the Sixth Circuit has held that a district court exceeds its authority when it issues an order requiring pretrial production of *Brady* material. *United States v. Presser*, 844 F.2d 1275, 1284 (6th Cir. 1988). In *Presser*, the government appealed a pretrial order of the district court that required the government to disclose *Brady/Giglio* evidence prior to trial. *Id.* at 1276. The court surveyed this Court's decisions and determined that the *Brady* doctrine does not create a general right to pretrial discovery. *Id.* at 1283. The Sixth Circuit also relied on the Jencks Act provisions at 18 U.S.C. § 3500(b) which provide that government's witness statements only have to be turned over after the witness has

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[2]373 U.S. 83 (1963).

testified on direct examination. *Id.* at 1283. The court held that the Jencks Act controls the timing of disclosure of any exculpatory evidence contained within such statements. Thus, the rule in the Sixth Circuit has come to be that a district court has no authority to ensure that a defendant's Fifth Amendment right to due process is upheld by requiring pretrial disclosure of *Brady* material.

Dr. Hale's case presents a compelling example of how the Sixth Circuit's restrictive interpretation has the unforeseen consequence of denying litigants such as Dr. Hale the effective use of exculpatory information. Dr. Hale's case was extremely lengthy and complex. It resembled much more closely a complex civil, regulatory matter in many ways than it did a traditional criminal trial. This was a case that not even the greatest defense lawyer could wing with last minute preparation. The case required in-depth, early preparation.

Unfortunately, however, because the trial court lacked authority to order pretrial production, defense counsel never knew of the existence of interview memoranda that showed a progression of a witness' story that could have established Dr. Hale's theory of the case. Dr. Hale attempted to show that he had no knowledge of the scheme and that those who were involved in the fraud and now sought to implicate him were in fact simply trying to curry favor with the United States government after having gotten caught. These few of Dr. Hale's thousands of patients had fooled him and used

him. The memoranda showed just that scenario. The organizer of the entire scheme initially told the truth that Dr. Hale was not part of an agreement with them. Ramsey explained that they had lied to the doctor to gain admission to the hospital. Later, after months had gone by in which Ramsey realized he was facing an extremely lengthy prison sentence, he told the prosecution team what they had clearly indicated in the first interviews they wanted to hear.

Armed with the knowledge that Ramsey had exculpated Dr. Hale and then changed his story, defense counsel could have launched a devastating attack, both on Ramsey and the manner in which the government investigators carried out their investigation. Defense counsel could have effectively shown the jury how the prosecution team suggested to those who participated in the fraud that the government wanted to hear that Dr. Hale was involved and that, facing lengthy prison terms, at least Russell Ramsey finally gave them what they wanted to hear.

Without pretrial disclosure of the memoranda themselves, effective cross-examination of Ramsey was impossible, and the jury never got to hear about the suggestions that the government team made to Mr. Ramsey at the first, exculpatory interviews. That pretrial disclosure is in some cases the only effective way to disclose *Brady* material is illustrated by what actually happened in this case. In the face of renewed *Brady* request by the defense, the prosecutor

did produce these memoranda for the trial court's inspection, but because of the way the prosecutor handled the disclosure, the trial court only had a few seconds after the witness had testified on direct examination to review the documents. The district court's cursory review proved to be too little too late. The district court informed defense counsel orally that the memoranda contained statements that Russell Ramsey had lied to the doctor and that there had been no predetermined agreement. However, without having the documents themselves, defense counsel was wholly unable to use this information. On cross examination, one of defense counsel's first lines of questioning involved a statement made by the court that Russell Ramsey had at one time said that doctors did not know about insurance forms. Ramsey's response was, "I believe the doctors knew everything." Without having the document, defense counsel could not impeach Ramsey with his prior exculpatory statements. A bench conference was held, and defense counsel explained that he was at a loss as to how to handle the situation. The district court acknowledged the problem caused by the manner in which defense counsel's access to the memorandum had been restricted:

> I gave you what was exculpatory in that one paragraph. There were other things said in that paragraph that made me believe that--I don't want to play psychologist--that maybe Russell Ramsey was sort of in a train of

> thought because I knew that what was said was that he did not think the doctors knew, but the very next sentence was, well, they did have to get the doctor's signature on the form or something to that extent.

The court went on to acknowledge, "[t]hat's the problem when you get just exculpatory information."

Thus, even the district court was uncertain about how to handle the disclosure. Other courts have grappled with the timing of *Brady* disclosure, and several different approaches can be gleaned. As the Court of Appeals for the Fourth Circuit has noted, part of the confusion stems from the fact that "the Supreme Court has never pinpointed the time at which the disclosure must be made." *United States v. Anderson*, 481 F.2d 685 (4th Cir. 1973), aff'd 417 U.S. 211 (1974).

Some courts have clearly held that pretrial disclosure under certain circumstances is required in order to safeguard the defendant's right to due process. For example, in *Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974), the United States Court of Appeals for the Second Circuit held that certain types of *Brady* material must be disclosed prior to trial in order to allow full exploitation by the defense. *Id.* at 382. As the Second Circuit made clear:

> Although it may well be that marginal *Brady* material need not always be disclosed upon

> request prior to trial, the fact that Ms. Harris had selected Walsh as a suspect was without question specific, concrete evidence of a nature requiring pretrial disclosure to allow for full exploration and exploitation by the defense. This information, so withheld by the government, would have had a material bearing on defense preparation and therefore should have been revealed well before the commencement of the trial.

Grant, 498 F.2d at 382 (citations omitted).

Other circuits have taken a much more balanced approach than the Sixth Circuit and have recognized that pretrial disclosure of *Brady* material may be required in order to ensure its effective use. This issue has often come up when courts consider whether exculpatory information, which is also covered by the Jencks Act, must be disclosed prior to trial. The United States Court of Appeals for the Fourth Circuit, for example, has recognized that district courts may need to order earlier production of *Brady* material. As the court stated, the Jencks Act "in no way impairs the government's constitutional obligations under *Brady v. Maryland*." *United States v. Williams*, 10 F.3d 1070, 1079 (4th Cir. 1993), *cert. denied*, 115 S. Ct. 313 (1994).

Similarly, the United States Court of Appeals for the Third Circuit has recognized that "compliance with the

statutory requirements of the Jencks Act does not necessarily satisfy the due process concerns of *Brady*." *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984).[3]

Several thoughtful district court opinions have taken this approach as well. *E.g.*, *United States v. Owen*, 933 F. Supp. 76, 84 (D. Mass. 1996) ("given the important nature of the constitutional rights at stake, this court rules that the *Brady* requirement must effectively trump the Jencks Act where the two are in direct conflict.")

In *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir.), *cert. denied*, 424 U.S. 924 (1976), the court held that "[d]isclosure by the government must allow the defense to use that favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pretrial disclosure." The *Pollack* court proposed the use of a balancing test which could utilize the district court's ability to weigh competing interests:

> Application of a strict rule in this area would inevitably produce some situations in which late disclosure would emasculate the effects of *Brady* or other situations in which premature disclosure would unnecessarily encourage those dangers that militate against extensive

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[3]In *Presser*, the Sixth Circuit acknowledged that its approach potentially conflicted with the Third Circuit's approach in *Starusko*. *Presser*, 844 F.2d at 1283, n.9.

> discovery in criminal cases, *e.g.*, potential for manufacture of evidence or bribing of witnesses. Courts can do little more in determining the proper time for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions.

United States v. Pollack, 534 F.2d at 973-74.

On the other hand, other circuits have joined the Sixth Circuit, at least to the extent of holding that where evidence is both *Brady* and *Jencks* material, the Jencks Act controls the timing of disclosure. *United States v. Scott*, 524 F.2d 465, 467-68 (5th Cir. 1975); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980). None of these cases, however, seems to go as far as the Sixth Circuit opinion purports to do in preventing the district court from ordering the pretrial production of *Brady* material that is not necessarily covered by the Jencks Act.

As noted above, the United States Court of Appeals for the Fourth Circuit takes the position that *Brady* is fulfilled when a disclosure of exculpatory material is made at a time such that it allows the defense to make effective use of the material at trial. *See United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 532 (4th Cir.), *cert. denied*, 474 U.S. 1005 (1985). The Fourth Circuit has clarified that

"disclosure to be effective must be made at a time when the disclosure would be of value to the accused." *United States v. Elmore*, 423 F.2d 775, 779 (4th Cir 1970), *cert. denied*, 400 U.S. 825 (1970). This Court should clarify that, in a complex case, it is highly likely that effective disclosure must be made at a time well in advance of trial.

In this case, the writ should be granted to clarify that district courts do have a role to play in determining the timing and manner of *Brady* disclosure. This Court could also use the opportunity to promulgate a balancing test to set out those proper factors. Among those of course would be the complexity of the case. Clearly, in this case, the complexity required pretrial production. This Court could also clarify the manner in which disclosure is to be made. In this case, the district court's quick attempt to summarize the exculpatory material was of no value to the defendant. Thus, the Sixth Circuit plainly erred when it held that the most telling exculpatory material was revealed to the defense by the trial judge and was of a nature that it could be effectively exploited by cross examination. (App.10). Even the trial judge's comments revealed the limitations of the district court's disclosure.

This Court should also grant the writ to clarify for Department of Justice prosecutors what their role is and that the courts do have authority over their conduct. After the Sixth Circuit found that the prosecutor had withheld *Brady*

material in this case, that same prosecutor disclosed to the court that one of the things he had learned from the experience was that one of his approaches to this problem would be not to take notes of his interviews in the future. (App. 25).

II. THE STRICTER STANDARD OF *BRADY* REVIEW, WHICH MANDATES REVERSAL ONLY WHEN THERE IS A REASONABLE LIKELIHOOD THAT FALSE TESTIMONY COULD HAVE AFFECTED THE JUDGMENT OF THE JURY, SURVIVES *KYLES v. WHITLEY* AND APPLIES TO A SITUATION IN WHICH THE PROSECUTOR ELICITED A FALSE STATEMENT FROM A KEY PROSECUTION WITNESS ON REDIRECT EXAMINATION.

In *United States v. Agurs*, 427 U.S. 97 (1976), this Court set out three different types of *Brady* claims and applied different standards of review to each. The first standard was to govern the situation in which the prosecution introduced trial testimony that it knew, or should have known, was perjured. 427 U.S. at 103-104. The Court mandates strict review of this situation and held that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any

reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103. The second two *Agurs* situations arise where the government has failed to honor a defense request for disclosure of some specific exculpatory evidence or where the government failed to volunteer exculpatory evidence never requested or requested only generally. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court clarified that it would apply the same standard of review to the latter two situations. The test is that reversal is required "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. In *Kyles v. Whitley*, ___ U.S. ____, 115 S. Ct. 1555 (1995), this Court clarified and refined this *Bagley* materiality standard but specifically noted that it was not addressing any claim under the first *Agurs* category. *Kyles v. Whitley*, 115 S. Ct. at 1565 n.7.

Dr. Hale respectfully submits that this Court should grant the writ to clarify the first *Agurs* situation and specifically to clarify the difference in the standard of review set out in *Bagley* and recently clarified in *Kyles v. Whitley*.

In this case, the prosecutor elicited testimony from the organizer of the insurance fraud scheme, Mr. Ramsey, that was simply false. The context is the same as in the first *Brady* issue presented above. After having specifically denied defense counsel the opportunity to examine Mr.

Ramsey's glaringly exculpatory prior interviews, the prosecutor compounded the prejudice by having Mr. Ramsey affirm on redirect examination that Ramsey had always told the truth and always told the same thing he told the jury.

Q. So, you have talked about this on several occasions?

A. Yes, I have.

Q. And have you always told the same thing that you have told this jury, including what Dr. Hale's role was in this conspiracy?

A. I have tried my best 100 percent.

As set out above, contrary to this representation, Ramsey had previously in effect denied that Dr. Hale had any role other than to be used and deceived by the individual the government was using as a witness. It is difficult to comprehend asking this question when the prosecutor had the memorandum in his possession and was personally present at the interview for which the memorandum reflects that the prosecution team asked him why he was covering for the doctors.

After having just elicited information from Ramsey that he had always told the same story and had always told the truth, the prosecutor went on to ask Ramsey a leading question that called for an answer again that contradicted what Ramsey said when previously interviewed:

> Q. Did Don Collins tell you before you went down there in 1988 that Dr. Hale was already doing this?
>
> A. Yes.

Again, this directly contradicts the government's memorandum:

> We asked him [Russell Ramsey] to go back to the time when Donald Collins introduced him to the doctors. He stated that he was only introduced to Dr. Hale and not Dr. Lynch. He says that Donald Collins never said that he, Hale, was a "crooked" doctor. Donald Collins only told him, "They'll put you in--act hurt."

These affirmative acts by the prosecution mislead the jury and defense counsel.

Having discovered this problem, appellate counsel for Dr. Hale suggested to the Sixth Circuit that it would be appropriate for the court to review the error under the stricter, first *Agurs* standard set out for reviewing instances in which the prosecution elicits or fails to correct perjury. The Sixth Circuit failed to do so.

In contrast to the Sixth Circuit's decision not to apply the stricter standard of review in this case, the United States Court of Appeals for the Eleventh Circuit has determined that it is appropriate to apply the stricter standard when the prosecution, even unintentionally, made a false representation

to the jury but did not correct it when it had the opportunity to do so. *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995). The Eleventh Circuit found that the stricter standard was appropriate in cases involving prosecutorial misconduct in the corruption of a truth-seeking function. *Alzate*, 47 F.3d at 1110.

In light of the importance of the issue and the differing approach taken in the different circuits, this Court should grant the writ to clarify under what circumstances the stricter standard is to be applied after *Kyles v. Whitley.*

III. THE SIXTH CIRCUIT'S INTERPRETATION OF RICO'S "RELATEDNESS" REQUIREMENT, WHICH ALLOWS UNRELATED MAIL FRAUD SCHEMES TO BE JOINED IN ONE RICO COUNT AS LONG AS EACH SCHEME ALLEGES MULTIPLE MAILINGS, EVISCERATES THE "RELATEDNESS" REQUIREMENT AND RENDERS THE STATUTE UNCONSTITUTIONALLY VAGUE.

The issue placed before the United States Court of Appeals for the Sixth Circuit was whether two unrelated mail fraud "schemes" can be lumped together in one RICO count in an attempt to create a "pattern of racketeering activity." As

Dr. Hale set forth, a common sense reading of the statutory language indicates that unrelated criminal activity cannot form a "pattern" as a matter of law. Dr. Hale has shown that the Medicare/Medicaid over utilization allegations bore no relationship to the Kentucky insurance fraud scheme. The Sixth Circuit explicitly disregarded the problem:

> Even if we assume *arguendo* that the alleged Medicare and Medicaid abuse was unrelated to the Kentucky insurance fraud, there were many related predicate acts involved in the insurance fraud alone. This is enough to satisfy the RICO relatedness requirement.

(App. at 18) (citations omitted).

In one fell swoop, this ruling eviscerates the "relatedness" requirement, conflicts with established circuit precedent (including its own), and renders the statute unconstitutionally vague.

First, the Sixth Circuit's novel holding that unrelated mail fraud schemes could be joined in one RICO count as part of a "pattern" just because each scheme involved more than one mailing directly contradicts other circuit precedent. In *Feinstein v. Resolution Trust Corporation*, 942 F.2d 34 (1st Cir. 1991), the United States Court of Appeals for the First Circuit clearly rejected a similar argument. There, the court addressed two different sets of transactions stemming from formation of joint ventures. *Id.* at 44. The court found that,

as here, each of the "schemes" featured several transactions. *Id.* Nevertheless, the fact that each scheme contains several transactions did not overshadow the real problem which was that the unrelated schemes could not be joined in a single RICO count alleging a pattern of racketeering. *Id.*

Specifically in mail fraud context, there is a host of cases which hold that the mere fact that there were several mailings alleged to be in furtherance of a single scheme does not create a RICO pattern. *E.g., United States Textiles, Inc. v. Anheuser-Busch Companies, Inc.*, 911 F.2d 1261, 1267-69 (7th Cir. 1990); *Sutherland v. O'Malley*, 882 F.2d 1196, 1205 (7th Cir. 1989) ("mail fraud and wire fraud are perhaps unique among the various sorts of 'racketeering activity' possible under RICO and that the existence of a multiplicity of predicate acts . . . may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate into a 'pattern' of racketeering activity."). In *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278 (7th Cir. 1989), the court further explained this concept:

> The plaintiffs are mistaken to emphasize the raw number of mail and wire fraud violations. Some of the present uncertainty over the pattern elements stems from such arguments which depend upon the unusual nature of

> these two most commonly alleged RICO predicate acts.
>
> RICO includes as "racketeering activity" any act indictable under the mail and wire fraud statutes. In mail and wire fraud, each mailing or interstate communication is a separate indictable offense, even if each relates to the same scheme to defraud, and even if the defendant did not control the number of mailings or communications. Thus, the number of offenses is only tangentially related to the underlying fraud, and can be a matter of happenstance.

(Citations omitted).

In the past, even the United States Court of Appeals for the Sixth Circuit had recognized that multiple mailings under one scheme could not cure the fact that unrelated schemes cannot be joined in one RICO count. *Vild v. Visconsi*, 956 F.2d 560, 567 (6th Cir. 1992), *cert. denied*, 506 U.S. 832 (1992). In the instant case, the Sixth Circuit seems to have abandoned its prior reasoning.

Second, the Sixth Circuit's approach undermines the defendant's right to a unanimous jury verdict. The Sixth Circuit ruling indicates that a pattern could have been made out of multiple mailings under either "scheme." That is not how Dr. Hale was charged. There is no way to know whether

a jury would have convicted Dr. Hale if the indictment had only alleged the private insurance fraud scheme as consisting of a pattern. Thus, the Sixth Circuit's approach undermines Dr. Hale's right to a unanimous jury verdict.

Finally, the Sixth Circuit's ruling renders the pattern requirement so nebulous that the RICO statute must be deemed unconstitutionally vague. Justice Scalia foreshadowed this problem in his concurring opinion in *H.J., Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 256 (1989):

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

In affirming a conviction that was based on an allegation of a "pattern" which itself comprised wholly unrelated activity, the United States Court of Appeals for the Sixth Circuit has inadvertently excised from the statute the meager guidance that the public and the courts had previously been given regarding the scope of the RICO statute and the meaning of the pattern requirement.

CONCLUSION

Dr. Hale's due process right to bring the truth before the jury was abridged by the prosecutor's refusal to disclose exculpatory evidence and by his eliciting false statements from Mr. Ramsey. This Court should grant the writ to clarify to all district courts that they do have the right to prevent such deprivations before trial and to clarify the standard under which courts of appeals review instances of putting false testimony before the jury. This Court's review would also serve to clarify an important issue regarding limitations on the RICO pattern requirement. Dr. Hale respectfully prays that a writ of certiorari issue.

Respectfully submitted,

ROBERT W. RITCHIE
WADE V. DAVIES
Counsel of Record
RITCHIE, FELS & DILLARD, P.C.
606 West Main Avenue
P. O. Box 1126
Knoxville, TN 37901-1126
(423) 637-0661
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE Nº 95-5915

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 95-5915
Filed January 28, 1997

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NOT RECOMMENDED FOR PUBLICATION

No. 95-5915

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	) **OPINION**
	) (Filed 1/28/97)
Plaintiff-Appellee,	)
	) ON APPEAL FROM
v.	)THE UNITED
	) STATES DISTRICT
DAN E. HALE,	) COURT FOR THE
	)EASTERN DISTRICT
Defendant-Appellant.	) OF KENTUCKY

BEFORE: NORRIS, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Dr. Dan E. Hale appeals from his multi-count conviction for crimes related to his Tennessee medical practice. For the reasons outlined below, we now affirm his conviction and sentence.

I.

Defendant began practicing medicine in Morristown, Tennessee, in 1977. For many years he worked in loose association with Dr. Gene Lynch, eventually purchasing his practice in 1992, at which time Lynch became an employee of defendant's professional service corporation, Boulevard West Medical Center ("BWMC").

In the early 1990s, several insurance companies contacted the United States Postal Service to report their belief that a large-scale insurance fraud was ongoing in Kentucky and Tennessee. The Lexington, Kentucky, office of the Postal Inspection Service looked into the matter. Inspector Lanny Miller contacted insurance companies in an effort to determine the extent of the fraud and the identity of the perpetrators. Eventually, the Inspection Service focused on about forty people living near Mt. Vernon and Corbin, Kentucky.

The fraud worked simply. Participants would buy numerous hospital indemnity policies that paid a sum certain in the event of a hospital admission. They would then fake injuries, present themselves to a "sympathetic" doctor, and gain admission to a hospital, typically for a soft tissue injury. The participants then filed claims for coverage with numerous insurance companies.

After investigators developed a detailed understanding of how the fraud operated, they confronted some of the

participants, thirteen of whom testified against defendant, explaining how he helped them by authorizing hospital stays. Russell Ramsey, who directed many of the participants, recalled how defendant had facilitated the enterprise. Ramsey would simply tell defendant that he had somebody who needed "doctoring." So certain was Ramsey that his charges would be admitted to the hospital that he explained in advance what they needed in the way of supplies for a stay of ten to fifteen days.

The fraud spanned several years, during which time Ramsey estimated that he orchestrated as many as 100 admissions to the Morristown hospitals. He also indicated during trial that defendant seemed to know what was going on with respect to the fraud although they did not discuss it specifically because, in Ramsey's view, "I was kind of protecting him." According to Ramsey, defendant suggested that the people he brought in for admission should "ride in wheelchairs." As further evidence of their close association, Ramsey testified that defendant once asked to borrow $200,000 to buy equipment for the office.

A primary issue at trial and on appeal involves when, and if, defendant knew of the fraud. Defendant focuses on what he sees as inconsistencies in three pretrial interviews of Ramsey by law enforcement officials. In two of them, Ramsey insisted "there was no predetermined agreement between he [sic] and the doctors." In the last interview,

however, after having "had a good bit of time to reflect on his relationship with Dr. Dan Hale," Ramsey claimed that he would talk to defendant the day before he was to bring in a new "patient." Defendant would tell Ramsey how to have the patients behave: bend over in pain, use a wheelchair, and request pain medication. He also discouraged Ramsey's fondness for staging car accidents because they involved police; rather, "a bathtub was a good place to have an accident."

Other testimony that pertained to defendant's knowledge of the fraud came from Steven Taylor, who administered a hospital in Morristown. In 1990, he was warned that the hospital was being used for fraud. Testifying from a contemporaneous file memorandum, Taylor recalled that he discussed the fraud with defendant and Lynch. Defendant indicated that he was aware of it. Although the admissions stopped for a few months, they soon resumed.

While the insurance fraud investigation moved forward, the Tennessee Bureau of Investigation began looking into possible over billing by defendant in an attempt to defraud the Medicare and Medicaid programs. Testimony during trial indicated that his goal was to see as many patients and perform as many tests as the government would pay for. To that end, he used a three-minute egg timer to pace himself, and posed special challenges to staff. During "EKG month," for instance, they would be rewarded if they exceeded the

number of EKGs performed during the same month the year before.

A doctor who worked briefly for defendant was told by him that he must test patients every time they walk in the door. As a result of this policy, tests were often scheduled before the doctor even saw the patient.

In short, the testimony at trial from former employees, including doctors, nurses, and staff about unnecessary testing and dubious billing was overwhelming. Defendant does not dispute this but rather argues that an avalanche of inadmissible evidence unfairly prejudiced his defense.

Defendant was charged with numerous counts of mail fraud in violation of 18 U.S.C. § 1341, as well as criminal and civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. §§ 1961-68. After a lengthy trial, a jury convicted him on all counts.

II.

I. Brady Material

It is well-established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been

disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). This does not require demonstration by a preponderance that disclosure would have resulted in an acquittal; rather, a reasonable probability of a different result is shown when the government's suppression of the favorable evidence undermines confident in the outcome of the trial. *Kyles v. Whitley*, 115 S.Ct. 1555, 1566 (1995).

Because, as a practical matter, implementation of the *Brady* rule contemplates that the government will enjoy a measure of discretion in determining whether evidence in its possession is material, it is burdened with a corresponding duty to evaluate potential *Brady* material in a manner that will result in a fair trial. It is the prosecution's duty, after all, to seek a just verdict, not a conviction. *See Berger v. United States*, 295 U.S. 78, 88 (1935). It alone knows what evidence remains undisclosed and therefore it must be assigned the primary responsibility of gauging whether it constitutes evidence favorable to the accused and is therefore discoverable. *Whitley*, 115 S.Ct. at 1568.

In the case before us, counsel for defendant sought access to pretrial statements made by participants in the fraud scheme. Among the statements in the government's possession were summaries of the three interviews of Russell Ramsey. Because the government took the position that these statements were not exculpatory, defense counsel asked the

trial court to inspect the statements *in camera* prior to cross-examination of the witness and make an independent determination whether any of the material should be provided to the defense.

After the direct examination of Russell Ramsey, the trial court reviewed the interview summaries and concluded that "the essence of most of these exculpatory matters have been hit by Mr. Ramsey." However, the court went on to mention that the summaries indicated that Ramsey lied to the doctor about the injuries of the people he brought to the hospital; that he insisted that there was no predetermined agreement between himself and defendant; and that he would tip the women in defendant's office $100 to fill in insurance forms that were later signed by defendant. Although defense counsel attempted to use the information provided by the district court to cross-examine Ramsey, he contends that the timing and nature of the disclosure compromised his ability to cross-examine the witness effectively.

This court reviews de novo the issue of whether evidence withheld by the prosecution constituted *Brady* material. *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991). Having had the opportunity to review the three interview summaries at length, a privilege that the government's handling of this material denied to the district court, we conclude that the memoranda contain exculpatory material that should have been disclosed to the defense prior

to trial. The following statements culled from the interviews provide a non-exhaustive list of *Brady* material:

> "Russell stood by his original claim that he went in and lied to the doctor about the injuries of the people he brought there. He insisted there was no predetermined agreement between he [sic] and the doctors."
>
> "[Inspector] Lanny [Miller] asked Russell why he felt he needed to protect the doctors. Russell responded that he wouldn't."
>
> "Russell was asked if he'd ever told anyone that he had an agreement with the doctors about the scheme. He stated 'no, that he'd always led everyone to believe he was in control of the situation.'"
>
> "He said that on occasion, he would ask to be admitted to the hospital, but that he never talked to the doctors about actually faking the accidents."
>
> "He never gave the doctors bribes -- only paid the bill."

In light of these statements and others not cited, the government's contention that the interview summaries do not contain exculpatory material is patently unsupportable. Moreover, its position that Russell Ramsey's trial testimony was consistent with these statements is likewise incorrect.

One instance will suffice to illustrate this point. As noted above, Ramsey stated before trial that he would not protect the doctors. That hardly can be reconciled with his assertion during trial that "I was kind of protecting him [defendant]."

The prosecution, then, was obliged to release the exculpatory portions of the interview summaries to defendant. In failing to do so, it improperly failed to carry out its duty to evaluate the exculpatory nature of the statements. Surely, the prosecution's affirmative duty under *Brady* to disclose evidence favorable to a defendant includes the affirmative duty to evaluate whether the evidence is favorable to a defendant; the prosecution cannot avoid the former duty by defaulting on the latter and delegating it in every instance to a trial judge. While it may be proper to seek the intervention of the trial court where the material is arguably non-exculpatory, that certainly was not the situation with these interview summaries. Here, the trial judge effectively evaluated the materials. However, since any last-minute evaluation by the trial court runs the risk of not providing the defense with an opportunity to prepare an adequate cross-examination, which in turn may compromise the overall fairness of the trial, it is all the more imperative that the government not shirk its duty to make good-faith evaluations.

Furthermore, non-disclosure of *Brady* material places an onerous burden on an appellate court. We must answer the question posed by *Whitley*: Did the absence of the exculpatory

material have the cumulative effect of depriving defendant of a verdict worthy of confidence? *Whitley*, 115 S.Ct. at 1566-67. In the context of a lengthy trial such as the one now before us, resolution of this issue represents a difficult and time-consuming task, requiring us to review the record of the entire trial in order to determine the effect of non-disclosure.

We have done so and conclude that, although the prosecution should have provided defense counsel with interview summaries, their non-disclosure does not require reversal. The most telling exculpatory material was revealed to the defense by the trial judge, and it was of a nature that it could be effectively exploited by cross-examination if the defense cared to utilize it. Evidence of guilt, both direct and circumstantial, was overwhelming. While we disagree with the government's characterization of Russell Ramsey's testimony as "relatively minor," we do not believe that the verdict in any way hinged upon it. Furthermore, much of his testimony, which was clearly damaging to defendant, was consistent throughout. Thus, while the exculpatory material could have been used to impeach Ramsey, it would not have enabled defense counsel to negate entirely the damaging nature of his testimony. Given these considerations, our confidence in the verdict remains intact.

2. Evidentiary Issues

Over the objection of defense counsel, the trial court permitted the government to introduce evidence that the

insurance fraud was much greater than that actually charged; according to this testimony, which was admitted pursuant to Fed. R. Evid. 404(b),[3] as many as 170 individuals took part in the fraud. In its motion in limine, the government contended that this evidence was admissible on the ground that it tends to show a common scheme and to prove defendant's knowledge of the fraud:

> It is beyond challenge that the Kentucky people were patients of Dr. Hale and Dr. Lynch and that the Doctors placed them in the hospital. The sole issue for jury determination is what was Dr. Hale's state of mind when he admitted these people. To borrow a phrase: "What did he know, and when did he know it?"
>
> In this context it is easy to see that anything which imputes to Dr. Hale knowledge of the fraud, or makes his knowledge more probable, is probative and

---

[3]Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case, shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b).

> admissible. . . . To the extent that Dr. Hale takes the position that he could not see this forty person Kentucky scam being perpetrated through his office because it was not that large in comparison to his overall practice, then the existence of a 170 person identical scam would be admissible to refute his defense.

Defendant contended that such testimony was overly prejudicial, consisted of inadmissible hearsay, and was improper opinion testimony.

In *United States v. Feinman*, 930 F.2d 495 (6th Cir. 1991), this court set out the following guidelines for reviewing Rule 404(b) issues:

> A trial court must employ a two-step analysis in determining the admissibility of evidence offered under Fed. R. Evid. 404(b). First, the trial court must ascertain whether the proffered evidence is relevant and admissible for a proper purpose. To be relevant, the evidence must relate to a matter which is "in issue," and must deal with conduct substantially similar and reasonably near in time to the offenses for which the defendant is being tried. To determine whether the proffered evidence is admissible for a proper purpose, the trial court must decide, whether

> that evidence is probative of a material issue other than character.
>
> Finally, the court must determine whether the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice." The district court has broad discretion in balancing probative value against potential prejudicial impact. We review a district judge's balancing of prejudicial impact and probative value under Fed. R. Evid. 404(b) under an abuse of discretion standard.

Id. at 499 (citations omitted).

Insurance investigator Tom Isbell testified about his work uncovering fraud in Tennessee, which defendant contends violates Rule 602 of the Federal Rules of Evidence: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Among other things, Isbell mentioned investigating sixty-eight suspicious claims involving soft tissue injuries. Nearly all of them were patients of either Dr. Lynch or defendant. He also described a conversation that he had with defendant in 1991 concerning suspected insurance fraud.

Inspector Lanny Miller of the Postal Service also testified regarding the "larger scam." Like Isbell, he used charts summarizing the various participants in the fraud to

help illustrate his testimony. In our view, the testimony of both Isbell and Miller is admissible. Contrary to the position taken by defendant, each man discussed a subject of which he had intimate personal knowledge, to wit, his own investigation of fraud.

The testimony introduced by the government relating to the alleged abuse of the Medicare and Medicaid programs was supported in large part by administrators and investigators who testified about defendant's administrative history with the programs.

According to witness Yvonne Wood, who investigated fraud in the Medicaid program, the Medicaid Bureau could track suspected "over utilization" by comparing doctors. When it determined that a claimed procedure was not medically necessary, it would send the doctor a "recoupment" letter. She indicated that defendant had received such letters, which she characterized as a relatively rare event.

Another witness, Kay Hogan, indicated that defendant fell statistically into the "top 1%" of doctors with the most aberrant history of Medicare claims. Similar testimony culled from investigations and statistical models was admitted from other witnesses as well.

Defendant argues that all of this testimony was improper, at least in part, as "scientific" evidence introduced by lay witnesses and it violated the rule against hearsay. He also contends that it was overly prejudicial.

However, at trial defense counsel did not object to either lay witness testimony or to hearsay. Consequently, we review for plain error. Fed. R. Crim. P. 52(b). Neither issue remotely approaches the level of plain error required for reversal. *See United States v. Olano*, 507 U.S. 725 (1993) (explaining the application of Rule 52(b)).

Under *Feinman*, the trial court retains broad discretion when balancing the potential prejudice of proffered testimony against its probative value. 930 F.2d at 499. In this case, the fact that the primary defense theory was based upon defendant's alleged ignorance of the fraud convinces us that the district court did not abuse its discretion in ruling that the evidence relating to both the abuse of the Medicare and Medicaid programs and the actual extent of the insurance fraud were relevant and not unfairly prejudicial.

3. Use of Grand Jury Testimony

This circuit has held that as a general rule testimony given by a grand jury witness suspected of wrongdoing may be used against him in a later prosecution for a substantive criminal offense. *United States v. Slone*, 933 F.2d 595, 601 (6th Cir. 1987). Such statements are not considered hearsay. *Id.* (citing Fed. R. Evid. 801(d)(2)).

Nonetheless, defendant contends that *Slone* does not permit introduction of lengthy questions posed to him during grand jury proceedings because they represent statements made by the prosecutor, not by the defendant. We find no

support for this position. Rather, the questions were necessary to put defendant's responses in context and their introduction during trial was proper.

4. *RICO Pattern Requirement*

RICO requires a pattern of racketeering activity, defined as

> at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5). The Supreme Court requires the criminal conduct to be connected and related:

> In normal usage, the word "pattern" here would be taken to require more than just a multiplicity of racketeering predicates. A "pattern" is an "arrangement or order of things or activity," and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged."
>
> . . . .

> RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.
>
> . . . .
>
> What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threats, ***simpliciter***. This may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity.

H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 238-41 (1989) (citations omitted). Defendant focuses on the "relatedness" requirement, citing *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992), for the proposition that two separate schemes do not qualify. The *Vild* court looked to *H.J.*, noting that "[t]he plaintiff may satisfy the relationship requirement if the predicate acts alleged 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *Id.* at 566 (citing *H.J.*).

Even if we assume *arguendo* that the alleged Medicare and Medicaid abuse was unrelated to the Kentucky

insurance fraud, there were many related predicate acts involved in the insurance fraud alone. *See Dana Corp. v. Blue Cross & Blue Shield*, 900 F.2d 882, 886-87 (6th Cir. 1990) (single scheme containing repetitive illegal conduct satisfies relatedness requirement). This is enough to satisfy the RICO relatedness requirement.

5. Jury Instruction

Finally, defendant argues that the district court erred in giving a jury instruction that included the language "a scheme to deprive another . . . of the intangible right to honest services by false or fraudulent pretenses, representations, or promises."

Prior to November 18, 1988, such a charge was impermissible. *McNally v. United States*, 483 U.S. 350 (1987). In an attempt to address this situation, Congress enacted 18 U.S.C. § 1346, which reads: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services. This statute is not retroactive. *United States v. Davis*, 873 F.2d 900, 902 (6th Cir. 1989). Thus, defendant argues that the district court improperly allowed the jury to consider a theory of criminal liability that was invalid when some of his criminal conduct occurred.

The government concedes that the "honest services" portion of the instruction was given in error with respect to the wrongful activity committed by defendant before

November 1988. Because it did not premise its case upon an "honest services" theory, but rather upon the old-fashioned motive of financial gain, the government argues that the error does not require reversal.

Defense counsel neglected to object to the instruction and we therefore review it for plain error. Fed. R. Crim. P. 52(b). Taken in the context of the prosecution's theory of guilt, we conclude that defendant has not, as he is required to do, made a "specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *See United States v. Olano*, 507 U.S. at 735 (1993).

III.

For the foregoing reasons, the conviction and sentence of defendant are **affirmed**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER
DENYING PETITION FOR REHEARING *EN BANC*

Filed April 3, 1997

Pages 20 thru 21

No. 95-5915

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
	)	
v.	)	ORDER
	)	
DAN E. HALE, D.O.,	)	(Filed April 3, 1997)
	)	
Defendant-Appellant.	)	

BEFORE: NORRIS, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX C

U.S. Constitution, Amendment V
18 U.S.C. § 1961(5)
18 U.S.C. § 1962(c)
18 U.S.C. § 3500(b)

United States Constitution, Amendment V.

Criminal actions - Provisions concerning - Due process of law and just compensation clauses. – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

* * * * * * * * * * *

18 United States Code § 1961(5)

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 United States Code § 1962(c)

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * * * * * * * * * *

18 United States Code § 3500(b)

Demands for production of statements and reports of witnesses

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EXCERPTED RESPONSE TO PETITION
FOR REHEARING AND SUGGESTION
FOR REHEARING *EN BANC*

Filed April 19, 1997

Pages 24 thru 25

App. 24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NO. 95-5915

UNITED STATES OF AMERICA

Plaintiff-Appellee

vs.

DAN E. HALE

Defendant-Appellant

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(EXCERPT FROM PAGE 7)

Reasonable people can disagree as to whether more or less of the notes should have been disclosed. But to call what occurred here "cheating," deserving of the extreme remedy suggested, is preposterous. If the undersigned had any inclination to cheat or suborn perjury, there would not have been any notes to review.

There is a distinct risk of appearing recalcitrant by continuing to argue the *Brady* issue itself. And, the undersigned recognizes that the better course of action would have been to give over redacted summaries to avoid these issues.[4]

---

[4]These notes contained numerous investigative leads about lawyers, insurance agent, etc. that could not be disclosed while the investigation was ongoing. Redacting names would not suffice, because the identity could be deciphered from the context. Redacting the entire subject would have rendered the interviews confusing. (The Court must understand we are not talking about redacting just Ramsey's three summaries. There were 13 scammer witnesses whose summaries would have to be redacted). Having the Court review the summaries for exculpatory information, which this Court has repeatedly encouraged, seemed to be the proper course of action. In the future, to avoid this kind of issue, either no notes will be taken (still revealing oral *Brady*, but at least avoiding unnecessary context and semantics disputes), or redaction will have to be done.